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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEROME WALCZAK,

Plaintiff - Appellant,

v.

SAN BERNARDINO COUNTY, a
political subdivision of the State of
California; et al.,

Defendants - Appellees.

No. 06-55660

D.C. No. CV-04-01279-VAP

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted December 6, 2007
Pasadena, California

Before: SILVERMAN, WARDLAW, and IKUTA, Circuit Judges.

Jerome Walczak appeals the district court's grant of summary judgment in favor of Patricia Nuss, a detective for the San Bernardino County Sheriff's Department. After reviewing Detective Nuss's report of two investigatory pretext calls made to Walczak, the district attorney brought charges against Walczak under

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

California Penal Code § 288(a) for lewd acts upon a child. The pretext calls were undertaken because, without the corroboration Detective Nuss hoped they would provide, the allegations against Walczak would have been barred by the statute of limitations. The alleged molestation took place from 1978 to 1983, was reported in 2002, some nineteen years after the fact, and prosecution would have been barred by California's six-year statute of limitations, Cal. Penal Code § 801 (2003), unless there was "independent evidence that clearly and convincingly corroborate[d]" the alleged "substantial sexual conduct," Cal. Penal Code § 803(g)(2)(B).

Walczak brought this 42 U.S.C. § 1983 action after the assistant district attorney dropped the charges, stating that "the pretext calls did not contain exactly what was summarized by the detective in the supplemental report." Walczak argues that Detective Nuss violated his constitutional rights by deliberately and recklessly disregarding the truth in making material false statements and material omissions in the written reports of her investigation. Detective Nuss claims qualified immunity. Because jury questions were raised on the issue of Detective Nuss's entitlement to qualified immunity, summary judgment should not have been granted.

Police officers are entitled to qualified immunity "if they reasonably believe in good faith that their actions are constitutional." *Smiddy v. Varney*, 665 F.2d 261,

266 (9th Cir. 1981) (citation omitted). This immunity is lost where a “plaintiff can *both* establish a substantial showing of a deliberate falsehood or reckless disregard and establish that, without the dishonestly included or omitted information, the magistrate would not have issued the warrant.” *Hervey v. Estes*, 65 F.3d 784, 789 (9th Cir. 1995) (emphasis in original).

First, Walczak came forward with evidence that, taken in the light most favorable to him, establishes “a substantial showing of deliberate falsehood or reckless disregard for the truth.” *Hervey*, 65 F.3d at 788. There is no denying that Detective Nuss made several serious misstatements and omissions in the report she presented to the district attorney. In addition, a jury could find that Detective Nuss deliberately or recklessly distorted in an incriminating way comments attributed to Walczak.

Second, these misstatements are material as a matter of law because the remaining information in the reports is insufficient to support the bringing of charges under the heightened requirements of California Penal Code § 803(g) (2003). A magistrate had to be able to find not only ordinary probable cause but, in addition, that the charges were corroborated by independent evidence and that the corroboration was clear and convincing. *Id.* § 803(g)(2)(B). In short, had the officer’s report accurately portrayed the pretext calls, clear and convincing

corroboration would have been lacking. An accurate report of the pretext calls would have shown that Walczak adamantly denied the allegations and failed to confirm that any substantial sexual conduct occurred.

Detective Nuss is only entitled to summary judgment based on qualified immunity if there are no genuine issues of material fact in dispute. *See Bias v. Moynihan*, — F.3d —, No. 05-16752, 2007 WL 4198211, at *3 (9th Cir. Nov. 29, 2007). Walczak succeeded in raising a genuine issue of material fact because a reasonable jury could find that the material misstatements made by Detective Nuss were made deliberately or with reckless disregard for the truth. *See Hervey*, 65 F.3d at 791 (holding that whether the false statements were made deliberately or recklessly is a factual determination for the jury). We remand for trial on this question.

Likewise, Detective Nuss was not properly granted summary judgment on Walczak’s malicious prosecution claim because there was a genuine issue of material fact as to whether Detective Nuss made deliberate falsehoods “with the intent to deprive [Walczak] of . . . [his] constitutional rights.” *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (citation omitted).

REVERSED and REMANDED.

